SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1121

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

DAVID NOROFF, MAG'S INCORPORATED, a corporation, doing business as SMITTY'S NEWS, and RICHARD ALLEN,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on November 21, 1967.

Citations to Opinion Below.

The opinion and judgment of the Supreme Court of the State of California, attached as Appendix A hereto is reported in 67 A.C. 814, 63 Cal. Rptr. 575 and 433 P. 2d 479.

Jurisdiction.

The judgment of the Supreme Court of the State of California[1] was entered on November 21, 1967.

[1]The highest Court of the State of California, California Constitution, Art. VI, Secs. 1, 11 and 12.

(Appendix A.) Rehearing was denied on December 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).[2]

Question Presented.

Has the California Supreme Court deprived the People of the State of California of due process and equal protection of law by preventing them from presenting evidence of "pandering" in obscenity cases, contrary to the decisions of this Court?

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of Sections 311 and 311.2 (Appendix C) of the Penal Code of the State of California.

Statement.

Respondents were charged in verified complaints, filed in the Municipal Court of the Los Angeles Judicial District with having committed violations of California Penal Code Section 311.2. It was alleged that the respondents

> "did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter, to wit: A magazine, INS, *International Nudist Sun*, Vol. 1, No. 5."

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[2]The decision of the California Supreme Court is a final judgment within the meaning of 28 U.S.C. 1257(3) because it affirmed an order of dismissal.

Demurrers to the complaints on the ground among others that this material was protected by the free speech and press provisions of the First and Fourteenth Amendments of the United States Constitution were heard and overruled. The respondents entered pleas of not guilty and the cases were set for trial. A motion to dismiss on Constitutional grounds was made to the trial court. The court viewed the magazine prior to trial. The trial court determined that this magazine was protected under the hereinbefore named provisions of the Constitution and dismissed the case.

The People appealed the dismissal to the Appellate Department of the Superior Court of Los Angeles County. The Appellate Department affirmed the dismissal in a written unpublished decision.

On petition of The People the case was certified to the Court of Appeal which accepted the case. The Court of Appeal reversed the dismissal in a decision reported at 250 A.C.A. 117 and 58 Cal. Rptr. 172. (Appendix B.)

The defendants thereupon petitioned the Supreme Court of the State of California to hear the matter and such court granted their petition. The Supreme Court of the State of California affirmed the dismissal in a written decision reported at 67 A.C. 814, 63 Cal. Rptr. 575 and 433 P. 2d 479. A petition by The People for Rehearing was denied.

Reasons for Granting the Writ.

The *Rule of evidence* enunciated in *Ginzburg v. United States* (1966), 383 U.S. 463, 16 L. Ed. 2d 31, is applicable to State prosecutions without a specific statute.

Ginzburg v. United States (1966) (383 U.S. 463, 16 L. Ed. 2d 31) Is Applicable to State Prosecutions.

Petitioner contends that the California Supreme Court has misinterpreted this Court's decision in *Ginzburg v. United States.* The pandering and commercial exploitation of pornography pronounced on March 21, 1966, by this Court is not a separate crime but *is properly a rule of evidence* to be applied in determining whether material is obscene.

In his concurring opinion in *Roth v. United States* (1957), 354 U.S. 476, 494; 1 L. Ed. 2d 1498, 1513, Chief Justice Warren described the important element in an "obscenity prosecution:"

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant, as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.
>
> ". . . The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of the customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. . . ."

This "variable" obscenity concept was adopted by a majority of this Court in *Ginzburg v. United States* (1966), 383 U.S. 463, 16 L. Ed. 2d 31. In *Ginzburg* this Court held that

> "the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, . . ." "There was abundant *evidence* to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic material openly advertised to appeal to the erotic interest of the customers.'"

The court perceived "no threat to First Amendment guarantees in thus holding that in close cases *evidence of pandering* may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test."

The opinion of the Supreme Court of California states that

> "the People initially charged that INS # 5 was obscene on its face. Unlike *Ginzburg v. United States* (1966), 383 U.S. 463, this is not a case in which 'the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene.'"

As we read *Ginzburg* and *Mishkin v. New York* (1966), 383 U.S. 502, 16 L. Ed. 2d 56, no charge of "pandering" was pleaded. The footnotes to those cases

set forth the statutes involved, which in substance, are similar to California's obscenity laws. Footnote 6 in *Ginzburg* (16 L. Ed. 2d 35-36) further discloses:

> "It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the *trial court admitted evidence,* otherwise irrelevant, toward that end."

In the instant case, the petitioner and the respondents submitted "INS # 5" to the court to determine if there was a triable issue. The court ruled there was no triable issue and immediately dismissed the case. This dismissal denied the petitioner their right to a jury trial, precluding the petitioner from presenting the *evidence of pandering* and commercial exploitation of pornography.

The trial judge dismissed the case after viewing the magazine. Petitioner contends that ordinarily judges are not qualified to determine whether photographs are obscene without enlightenting testimony. (*Levin v. State* (1967), 228 A. 2d 487, 489; 1 Md. App. 139, certiorari denied; 36 Law Week 3287). The petitioner should have been allowed to present evidence that the magazine had prurient appeal to a clearly defined deviant group. *Levin* which involved photographs "distinguished by a large penis in full erection" rejected the argument that there must be depiction of a sexual act for material to constitute hard-core pornography.

In *Donnenberg v. State* (1967), 232 A. 2d 264, 1 Md. App. 591, the court held that International Nudist Sun No. 2 and International Nudist Sun No. 3 were not hard-core pornography, but remanded the cases for new trial to allow the State to put on expert testimony regarding the required obscenity elements enunciated in *Roth v. United States* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498.

As shown by the opinion in the Court of Appeal (Appendix B), the petitioner before the trial court did urge that a triable issue existed which could only be determined after presentation of all relevant evidence; this would under *Ginzburg, Mishkin* and *A Book v. Attorney General* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, include *evidence of pandering,* without so pleading in criminal complaint.

The California Supreme Court's opinion implies that the indictment in *Ginzburg* charged the defendant with "pandering" in violation of 18 U.S.C. 1461. Neither that federal statute nor any other makes "pandering" a crime. In *Ginzburg,* the "trial court admitted *evidence,* otherwise irrelevant," to show the mode of distribution. Footnote 6 implies that "pandering" was not pleaded in the indictment. *United States v. Ginzburg* (1963), 224 F. Supp. 129, makes no showing that the defendant was "charged" with "pandering" in the indictment. The "pandering" was the *evidence* that the prosecution presented at the time of trial. (See: *United States v. Ginzburg* (1964), 338 F. 2d 12, 14-15).

This Court's opinion in *Ginzburg* repeatedly emphasized the probative value of "pandering" *evidence:*

> "This *evidence,* in our view, was relevant in determining the ultimate question of 'obscenity' and,

in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and the dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test."

This Court concluded that:

"It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such *evidence* may

support the determination that the material is obscene even though in other context the material would escape such condemnation."

In the *Noroff* opinion, the California Supreme Court rejected the "pandering" concept advanced in *Ginzburg*. That court stated that the State Legislature has created no such crime. Petitioner contends that the pandering *evidence* is applicable to state prosecutions without a specific statute.

In *A Book v. Attorney General* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, this Court held that "John Cleland's Memoirs of a Woman of Pleasure" was not utterly without redeeming social value. This Court, however declared that:

". . . the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. *Evidence* that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance . . ."

Massachusetts does not have a "pandering" statute; yet this Court held that commercial exploitation of the book "Fanny Hill" could lead to the conclusion that the book was utterly without redeeming social importance.

New York does not have a "pandering" statute. But Mishkin of *Mishkin v. New York, supra,* was prosecuted "for what he did, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books." The court admitted pandering *evidence.*

The importance of *Ginzburg* in State prosecutions was demonstrated in *Redrup v. New York* (1967), 386 U.S. 767, 18 L. Ed. 2d 515. In the three cases decided May 8, 1967—all involving State prosecutions —this Court ruled that "in none was there *evidence* of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States,* 383 U.S. 463."

In *Felton v. City of Pensacola* (1967, Fla.), 220 So. 2d 842, 848, the court ruled that nudist magazines may be obscene by the manner of presentation and by "pandering."

The importance of "pandering" *evidence* was demonstrated in the case of *Commonwealth of Pennsylvania v. Dell Publications, Inc.* (1967), 234 A. 2d 840, 427 Pac. 189, 195. The court, after analyzing the views of the various Justices of the United States Supreme Court, declared that:

> ". . . simple arithmetic shows that the votes of the 'Brennan-Douglas-Stewart axis' will, of necessity, result in a finding that the work, *in the absence of pandering,* is entitled to constitutional protection." (Emphasis added).

The courts of California in the past indicated that Ginzburg was to be applicable to State prosecutions. In *In re Klor* (1966), 64 Cal. 2d 816, 821, 51 Cal. Rptr. 903, 415 P. 2d 791, the California Supreme Court declared:

> "Moreover, as Chief Justice Warren points out in a concurring opinion in *Roth v. United States* . . . the central issue in a criminal obscenity trial pivots on the potentially punishable conduct of the defendant rather than upon the allegedly obscene nature of the material. (See: *Ginzburg v. United States . . .)*"

Landau v. Fording (1966), 245 Cal. App. 2d 820, 824, 830, 54 Cal. Rptr. 177 relied on *Ginzburg* for the holding

> "that *evidence* that material was commercially exploited for the sake of prurient appeal to the exclusion of all other values would justify the conclusion that the material was utterly without redeeming social importance . . ." Certiorari was denied June 12, 1967 (18 L. Ed. 2d 1317).

Evidence relating to the commercial exploitation of pornography is merely a *rule of evidence* to be considered in determining whether material is obscene. The United States Supreme Court did not intend that commercial exploitation was to be a crime *per se*. In *Noroff* the California Supreme Court is in effect requiring a new crime be created in place of one already judicially defined and established.

The opinion of the California Supreme Court stated that the State Attorney General advocated the amendment of the Penal Code to prohibit the offense of "pandering." Petitioner contends that the court misconstrued the statute proposed by the Attorney General. Section 311(a) introduced on January 18, 1967, in the California Legislature provided in subdivision (2) of Section 1, that:

> "In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, or publicity indicate that matter is being commercially exploited for the sake of its prurient appeal, such *evidence* is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

The Legislative Counsel's Digest of the proposed statute held that:

> "Where circumstances indicate the matter is commercially exploited for sake of its prurient appeal, such *evidence* is probative with respect to the nature of the matter and justify concluding the matter utterly without redeeming social importance."

The intent of the proposed statute was to incorporate the recent court decisions into California's obscenity laws. The *rule of evidence* set forth in *Ginzburg v. United States* was to be given probative value in determining whether material was obscene. The prurient appeal of material to a specially susceptible group as demonstrated in *Mishkin v. New York* was to be incorporated into California's pornography laws.

The purpose of Section 1 of the statute proposed by the Attorney General is stated in *A Report to the California Legislature* prepared by Thomas C. Lynch, Attorney General, April 6, 1967, page 16:

> "Section 1 of Senate Bill 78 amends section 311 and incorporates the *Ginzburg* decision which changed the concept of obscenity from a 'constant' one to a 'variable' one. In short, the definition of redeeming social importance is modified when acts and circumstances (i.e., that defendant's conduct) indicate that the violator is disseminating or advertising the material in such a manner as to appeal to prurient interest rather than to accentuate any possible value the material might have. This concept looks to an individual's conduct (pandering) and takes his standard of value (as meas-

ured by his own advertising) as the determination of any social importance the material might have. It should be noted that the amendment of section 311 quotes language directly from the United States Supreme Court opinions. The literal incorporation of these decisions should enable a lay jury to better understand these concepts through utilization of proper jury instructions."

Petitioner submits that it is apparent from this statement that the Attorney General's proposed statute intended "pandering" to be a *rule of evidence* in determining whether material is obscene, rather than a separate crime. The United States Supreme Court made "pandering" a *rule of evidence* when it reviewed *Ginzburg, Mishkin* and *A Book* even though none of the cases involved a "pandering" statute.

In the past the California courts have shown concern over the problems presented to prosecutors in the field of obscenity. (See: *Flack v. Municipal Court* (1967), 66 A.C. 1035, 1047-1048, 59 Cal. Rptr. 872, 429 P. 2d 192). The *Noroff* decision has taken from the hands of prosecutors throughout the State of California the very tools which this Court has deemed important. This Court has held that *evidence* that a defendant panders, titillates and commercially exploits his pornographic wares, deliberately emphasizing the sexually provocative aspects of his work in order to catch the salaciously disposed, is an important factor to be considered in determining whether the material is obscene. Such factors are to be applied to State prosecutions.

The California Supreme Court declared that "this court is bound by decisions of the United States Su-

preme Court." It is well settled that State courts are bound by decisions of this Court on federal constitutional issues. (United States Const. Art. VI, cl. 2). (*Martin v. Hunter* (1816), 1 Wheat 304, 4 L. Ed. 97; *Cohens v. Virginia* (1821), 6 Wheat 264, 5 L. Ed. 257). However, the opinion of the California Supreme Court completely disregards the *rule of evidence* pronounced in *Ginzburg*. In *A Book, Mishkin,* and *Redrup* the Court indicated that *"pandering" evidence* was to apply to State prosecutions.

The action of the California Supreme Court in removing *evidence of pandering* from the aspects of pornography prosecutions means that defendants who engage in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interests of the customers need merely stop just short of the "dim and uncertain line" of a "graphic depiction of . . . sexual activity." Though a defendant is engaged in the stock and trade of the business of pandering, the California Supreme Court has declared he may be found guilty only if his material is a graphic depiction of sexual activity, constituting hard-core pornography.

In *People v. G. I. Distributors, Inc.* (1967), 281 N.Y.S. 2d 795, 20 N.Y. 2d 104, certiorari denied, 19 L. Ed. 2d 219, a publication containing full page photographs of young men in various stages of undress or nudity was held to be obscene. The court considered the advertising in the book—another form of pandering—in determining whether the material was obscene.

Petitioner submits that the petitioner should have been allowed to present *evidence* that INS 5 is not a bona-fide nudist publication. Rather it is a collection

of photographs graphically posed to highlight the genitals. Most of the pictures were not taken in a nudist colony, but were photographed inside a building. This does not reflect the nudist way of life with nature. Rather this graphically depicts the lure of the sensualist as the respondents pander the public with a "nudist magazine" which in reality is nothing more than cheap pornography.

Petitioner should also have been allowed to present *evidence* that respondents are in the business of the production and dissemination of pornography. It is *evidence* of this behavior that is central to the objectives of criminal obscenity laws.

Petitioner contends that *Ratner v. California,* No. 729, October Term, 1967, demonstrates the conflict between the *Noroff* decision and the decisions of this Court. In *Ratner* the prosecution was allowed to present Ginzburg "pandering" *evidence.* The conviction was affirmed by the Appellate Department of the Superior Court of Los Angeles County. A hearing was denied by the Court of Appeal. Though Ratner would appear to be contrary to the *Noroff* decision, this Court denied certiorari on January 29, 1968. (See: 36 Law Week 3308).

Petitioner submits that the *rule of evidence* enunciated by this Court in *Ginzburg v. United States* is applicable to the States. The Supreme Court of California was in error when it refused to apply the *Ginzburg* rule to California prosecutions.

In so concluding, the Supreme Court of the State of California has decided a federal question of substance not in accord with applicable decisions of this Court.

(Rule 19(a) of Revised Rules of the Supreme Court of the United States, *Rogers v. Missouri P. R. Co.* (1957), 352 U.S. 500, 510, 1 L. Ed. 2d 493, 501, footnote 25).

The decision of the California Supreme Court deprived the People of the State of California of due process and equal protection of the law when that court refused to follow the decisions of this Court.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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